

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(RICHARD ALLEN GRIFFIN, P.J, JANET T. NEFF and HELENE T. WHITE, J.J.)
AND THE WORKER'S COMPENSATION APPELLATE COMMISSION

RONALD G. SWEATT,

S.C. NO.: 120220

Plaintiff-Appellee,

C.A. NO.: 226194

v

L.C. NO.: WCAC 99-0026

DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

**BRIEF ON APPEAL OF DEFENDANT-APPELLANT DEPARTMENT OF
CORRECTIONS**

ORAL ARGUMENT REQUESTED

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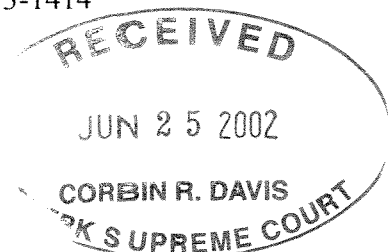


TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES	iii-iv
STATEMENT OF QUESTION INVOLVED	v
STATEMENT OF FACTS	1
ARGUMENT	7

Plaintiff is unable to obtain or perform work for defendant because of his commission of a crime. Section 361(1) of the Worker's Disability Compensation Act exempts the employer from liability when the plaintiff "is unable to obtain or perform work because of imprisonment or commission of a crime." Therefore, defendant "shall not be liable for compensation" in this matter. Section 361(1) contains no additional requirement that defendant demonstrate it can offer plaintiff "reasonable employment" as defined in Section 301(5) of the Worker's Disability Compensation Act before Section 361(1)'s exemption from liability applies. It was an error of law for the Court of Appeals and the majority of the Worker's Compensation Appellate Commission to import and add such requirement to Section 361(1). The importation of this non-361(1) requirement is especially inappropriate here because the decisions below require defendant to do something it is legally precluded from doing, *i.e.*, extend a *bona fide* offer of work to a person defendant cannot legally re-employ7

A. The statutory provision at issue	8
B. Plaintiff's commission of a crime means defendant cannot re-employ plaintiff because of MCL 791.205a	9
C. Application of §361(1) as it reads.....	10
D. Section 301(5)'s requirements are not cross-referenced in Section 361(1) and cannot legitimately be engrafted onto Section 361(1).....	12
E. "Catch-22"	13
F. This is a legal, not factual, question	15
G. Even if reference to job opportunities at defendant was a condition precedent to § 361(1)'s exemption, defendant proved such job opportunities.....	16
H. Inconsistencies in the decisions below.....	20
I. The ramifications of this decision flow beyond § 361(1).....	21

TABLE OF CONTENTS CONTINUED

	<u>PAGE</u>
RELIEF SOUGHT.....	26

INDEX OF AUTHORITIES

PAGE

Cases

<i>Ayoub v Ford Motor Co</i> , 101 Mich App 740; 300 NW2d 508 (1980)	14, 20
<i>Baskerville v Saunders Oil Co, Inc</i> , 336 SE2d 512 (Va App 1979)	11
<i>Bower v Whitehall Leather Co</i> , 412 Mich 172; 312 NW2d 640 (1981)	10
<i>Brinker's International, Inc v Workers' Compensation Appeal Board</i> , 721 A2d 406 (Pa Comm 1998)	11
<i>Brown v Premiere Mfg Co</i> , 77 Mich App 573; 259 NW2d 143 (1977)	24
<i>Cichecki v City of Hamtramck, Police Department</i> , 382 Mich 428; 170 NW2d 58, 61 (1969)...	15
<i>Dyer v General Motors Corp</i> , 318 Mich 216; 27 NW2d 533 (1947)	24
<i>Haske v Transport Leasing, Inc, Indiana</i> , 455 Mich 628; 566 NW2d 896 (1997)	23
<i>Hoffman Plastic Compounds, Inc v National Labor Relations Board</i> , 535 US ____; 122 S. Ct. Rep. 1275; 152 L. Ed. 2d 271 (2002)	20
<i>Hope v Welch Grape Juice Co</i> , 46 Mich App 128; 207 NW2d 476 (1973)	14, 20
<i>Jones-Jennings v Hutzel Hospital</i> , 223 Mich App 94; 565 NW2d 680 (1997)	14, 20
<i>Kolenko v US Rubber Products</i> , 285 Mich 159; 280 NW 148 (1938)	14
<i>Lauder v Paul M. Wiener Foundry</i> , 343 Mich 159; 72 NW2d 159 (1955)	22, 24
<i>McJunkin v Cellasto Plastic Corp</i> , 461 Mich 590; 608 NW2d 57 (2000)	5
<i>Mize v Cleveland Express</i> , 329 SE2d 275 (Ga App 1990)	20
<i>Price v City of Westland Police Department</i> , 451 Mich 329; 547 NW2d 24 (1996)	19
<i>Pulver v Dundee Cement Co</i> , 445 Mich 68; 515 NW2d 728 (1994)	10
<i>Russell v Whirlpool Financial Corp</i> , 461 Mich 579; 608 NW2d 52 (2000)	5, 24
<i>Simpson v Lee & Cady</i> , 294 Mich 460; 293 NW 718 (1940)	22, 24
<i>Sobotka v Chrysler Corp</i> , 447 Mich 1; 523 NW2d 454 (1994)	23

Statutes

1996 PA 140	2
MCL 28.601, <i>et seq.</i>	21
MCL 333.7401	10
MCL 338.42	21
MCL 418.301(1)	24
MCL 418.301(3)	23
MCL 418.301(4)	24
MCL 418.301(5)	5, 13, 19, 23
MCL 418.301(5)-(9)	10
MCL 418.301(5)(a)	passim
MCL 418.301(5)(e)	24
MCL 418.301(9)	12
MCL 418.305	22

INDEX OF AUTHORITIES

PAGE

Statutes Continued

MCL 418.319(1)	23
MCL 418.351	8, 12
MCL 418.361	13
MCL 418.361(1)	passim
MCL 418.371(1)	8
MCL 791.205a	6, 11, 22
MCL 791.205a(1)	2, 9, 10
MCL 791.205a(3)	11

Rules

MCR 9.120(B)(1).....	21
----------------------	----

Treatises

Larson, <i>Larson's Workers' Compensation Law</i> , Vol 1, §1.00, p 1-1 to 1-3 (2002).....	24
--	----

STATEMENT OF QUESTION INVOLVED

Section 361(1) of the Worker's Disability Compensation Act exempts the employer from liability where the claimant "is unable to obtain or perform work because of imprisonment or commission of a crime." Plaintiff is unable to obtain or perform work for defendant because of his past commission of a crime. Therefore, defendant "shall not be liable for compensation" in this matter. Have the decisions below legally erred in holding that this exemption does not apply? More specifically, was it an error of law for the decisions below to import and add a requirement to Section 361(1) that defendant must also demonstrate it would have offered plaintiff "reasonable employment" as defined in Section 301(5) of the Worker's Disability Compensation Act before Section 361(1)'s exemption applies? Is importation of this non-361(1) requirement especially inappropriate here because defendant cannot be required to do something it is legally precluded from doing, *i.e.*, extend a *bona fide* offer of work to someone defendant cannot legally re-employ?

STATEMENT OF FACTS

(Numbers in parentheses refer to the pages of Appellant's Appendix.)

Plaintiff worked for defendant as a corrections officer (9a). This job involved supervising inmates, including preventing fights between inmates (10a-11a). From the outset of his employment in 1986, plaintiff was aware that use of illegal drugs and an arrest for such would be cause for dismissal from work for defendant (36a).

Plaintiff's work injury occurred on December 8, 1989 (12a-17a). Plaintiff intervened in a fight between prisoners and was kicked in his right knee (*Id.*). He was hospitalized, underwent surgery, and had physical therapy (*Id.*). Thereafter he has had a continuing limitation in the use of his knee which precludes him from returning to work as a corrections officer (*Id.*).

Defendant began voluntarily paying plaintiff workers' compensation benefits (18a). Defendant could not offer plaintiff "reasonable employment" [a/k/a favored work, which is accommodated work that favors an employee's limitations] because defendant's policy at the time was that any corrections officer had to be "one-hundred percent fit for duty" to return to work (37a-38a).

While still receiving workers' compensation benefits, plaintiff was convicted of delivery of heroin and imprisoned on January 12, 1996 (18a). This offense was not plaintiff's first or last drug offense (33a-34a). Pursuant to civil service regulations, plaintiff's imprisonment severed plaintiff's employment with defendant (61a-62a; 36a). Plaintiff's workers' compensation benefits were also suspended while plaintiff was in prison pursuant to MCL 418.361(1). (18a).

Inmates, such as plaintiff, were required to render community service, perform work, or attend school while imprisoned (19a). Of these choices, plaintiff elected to work 40 hours per week plus occasional overtime at Miller Industries (21a). There, plaintiff performed a sit down job of making 8-oz. oil seals for Ford cars (19a; 24a-25a). Plaintiff received a wage from Miller Industries, part of which went to the department of corrections (20a-21a). Beginning on February 24, 1996, while plaintiff was still working at Miller Industries, plaintiff was permitted to spend nights at home on a tether (21a).

While plaintiff was serving his sentence, two things happened that impact this case. First, defendant's "one-hundred percent fit for duty" policy ended (38a). Since that policy change, defendant has returned persons to work even if less than "one-hundred percent fit for duty." (38a-40a). Second, while plaintiff was still serving his sentence, 1996 PA 140 became effective on March 25, 1996. This law forbids defendant to employ persons who, *inter alia*, had been convicted of a felony or who were subject to pending felony charges. MCL 791.205a(1). Plaintiff would have been eligible for re-employment at a modified job for defendant but for his felony conviction (38a-40a).

Plaintiff was released from the prison system and placed on parole on June 1, 1996 (47a). The following month plaintiff overdosed on heroin and was sent to a rehabilitation center for 90 days on recommendation of his parole officer (23a).

Plaintiff was released from the rehabilitation center in October 1996 (24a-26a). He wanted to return to work for Miller Industries (*Id.*). However, Miller Industries at the time was manufacturing cast iron pipe flanges weighing 120 lbs.; plaintiff could not physically do that work (*Id.*).

Plaintiff then petitioned the Bureau of Worker's Disability Compensation for workers' compensation benefits on November 18, 1996 (8a). The case was heard exactly two years later, on November 18, 1998 (*Id.*). Between the time of his petitioning for workers' compensation benefits and trial, plaintiff worked briefly at managing a paper route (26a-29a). That job ended in December 1997 (*Id.*). In June 1998, plaintiff was arrested on another drug charge, incarcerated for one month, with the charge ultimately dismissed (30a).

On July 7, 1998, still prior to trial, plaintiff began working for Pressure Vessel, Inc., a subsidiary of Elco Welding (30a-32a). His job there required him to make light parts for air conditioners, trucks, and cars, with much of the job performed while sitting (*Id.*). Plaintiff earned less there than he did for defendant (31a) [\$180/wk versus \$600.01/wk for defendant; (*Id.*; 45a; 32a)]. About this time plaintiff was also placed on a tether for a parole violation with 50% of his pay directed to the state (31a).

Trial was held before Magistrate L'Mell Smith. At trial, Joanne Bridgford, defendant's disability management coordinator, testified that defendant could have re-employed plaintiff but for the statutory prohibition against employing ex-felons (38a-40a). She has placed persons with knee injuries at jobs such as general office assistant, assistant resident unit manager inside the institution, training officers, and word processing assistants, amongst other jobs "kind of all over" (*Id.*). The type of accommodated job assigned an individual depends upon such things as the person's qualifications, vacancies, work restrictions, and geographical location (38a-43a).

The Magistrate held that plaintiff suffered from an ongoing disability and, while MCL 418.361(1) precluded plaintiff from receiving benefits while he was incarcerated, "there appears to be no case which authorizes defendant to terminate workers' compensation benefits

because plaintiff is no longer able to return to work with defendant.” (49a-51a). Consequently, the Magistrate granted plaintiff ongoing benefits from June 1, 1996 (the date of plaintiff’s release from prison) and thereafter.

Defendant appealed to the Worker’s Compensation Appellate Commission. The Commission decided the case *en banc*, a procedure where a matter “may establish a precedent with regard to workers’ compensation in this state”. MCL 418.274(9). After oral argument, the Commission remanded the case in an order to the Magistrate, saying:

The magistrate shall make a finding, based upon the existing record, whether defendant Department of Corrections would have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition against employment of any individual who had been convicted of a felony. The magistrate should recite the basis for her finding with references to the record. The Commission retains jurisdiction. (52a-53a).

In a remand opinion, mailed January 11, 2000, the Magistrate found that “there would not have been an offer of reasonable employment to plaintiff were it not for the statutory prohibition. To find otherwise would be pure speculation, something not permitted under Michigan law.” (56a-57a).

The case then returned to the Commission. In an opinion and order dated February 29, 2000, the Commission split 4–3 with the majority affirming the Magistrate’s award of weekly benefits (58a *et seq*).

The Commission majority concluded that the Magistrate’s factfinding - *i.e.*, defendant would not have offered plaintiff “reasonable employment” even if there had been no statutory prohibition - was supported by sufficient evidence in the record. (*Id.*) The Commission dissenters would hold that plaintiff was legally barred from benefits by operation of MCL 418.361(1). (*Id.*) The dissent viewed the majority as having placed “an artificially created

burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon.” (71a).

Defendant applied to the Court of Appeals for leave to appeal, which was granted (75a). The Court resolved the case via a published opinion with each Judge issuing a separate opinion (76a-91a). Judge Neff concluded that the Commission majority reached the correct result, but via wrong reasoning (80a). Judge Neff’s reasoning was primarily that workers’ compensation eschews permanent forfeiture of benefits as exemplified by MCL 418.301(5) and *McJunkin v Cellasto Plastic Corp*, 461 Mich 590; 608 NW2d 57 (2000) and *Russell v Whirlpool Financial Corp*, 461 Mich 579; 608 NW2d 52 (2000). (78a). Judge White affirmed the Commission majority on the reasoning it had offered, *i.e.*, that defendant did not sufficiently prove it would have offered plaintiff “reasonable employment.” (84a). Judge Griffin dissented. He concluded that as a matter of law “under the plain language of” Section 361(1) of the workers’ compensation act, defendant is not liable. (91a).

Defendant applied to this Court for leave to appeal. In an order entered April 30, 2002, the Court granted defendant’s application. This brief follows in support of defendant’s position that the Court should reverse the Court of Appeals.

Because the chronology of events and dates in this case are important, defendant includes here a listing of that chronology before undertaking its argument.

CHRONOLOGY OF EVENTS

June 2, 1986: Plaintiff begins working for defendant and is aware that his arrest for use of illegal drugs triggers dismissal from employment (36a).

December 8, 1989: Plaintiff's date of injury (44a).

January 12, 1995: Plaintiff is convicted of "delivery of heroin" (18a; 34a-35a), and incarcerated as of this day (18a). Defendant stops voluntary payment of workers' compensation benefits (47a). This stoppage of benefits is not challenged by plaintiff (88a). Plaintiff's employment is also automatically severed as a result of his felony conviction (61a-62a).

May 1995: While in prison, plaintiff begins working at Miller Industries in partial fulfillment of the terms of his incarceration (59a; 19a).

March 25, 1996: While still in prison, the Legislature passes into law MCL 791.205a which prohibits defendant from employing ex-felons (60a).

June 1, 1996: Plaintiff is released from prison (18a).

June to July 1996: Plaintiff continues working for Miller Industries (21a-23a).

July 1996: Plaintiff overdoses on heroin and is sent to a drug rehabilitation center for 90 days for violation of his parole (59a; 23a).

October 1996: Plaintiff returns to Miller Industries upon release from drug rehabilitation center but finds he cannot perform work there due to a change in job requirements at Miller (23a; 26a). Plaintiff begins working at paper route (27a-29a).

November 18, 1996: Plaintiff applies for workers' compensation benefits which commences this case (60a).

June 1998: Plaintiff arrested on another drug charge and incarcerated for one month (30a).

July 1998: Plaintiff begins working at Pressure Vessel/Elco at \$6.00 per hour, 30 hours per week (31a). Plaintiff on tether for parole violation with 50% of his pay going to the state (*Id.*).

November 18, 1998: Date of trial in the instant case, with plaintiff still working at Pressure Vessel/Elco (45a; 60a).

ARGUMENT

Plaintiff is unable to obtain or perform work for defendant because of his commission of a crime. Section 361(1) of the Worker's Disability Compensation Act exempts the employer from liability when the plaintiff "is unable to obtain or perform work because of imprisonment or commission of a crime." Therefore, defendant "shall not be liable for compensation" in this matter. Section 361(1) contains no additional requirement that defendant demonstrate it can offer plaintiff "reasonable employment" as defined in Section 301(5) of the Worker's Disability Compensation Act before Section 361(1)'s exemption from liability applies.¹ It was an error of law for the Court of Appeals and the majority of the Worker's Compensation Appellate Commission to import and add such requirement to Section 361(1). The importation of this non-361(1) requirement is especially inappropriate here because the decisions below require defendant to do something it is legally precluded from doing, *i.e.*, extend a *bona fide* offer of work to a person defendant cannot legally re-employ.

Section 361(1) of the workers' compensation statute contains no requirement that the employer extend "a *bona fide* offer of reasonable employment" as described in MCL 418.301(5)(a) to an injured claimant before the employer enjoys the exemption from liability recited in MCL 418.361(1). Yet, the decisions below import such a requirement from § 301(5)(a) and engraft it onto § 361(1) as a condition precedent to operation of the latter statute's exemption from liability. That is an error of law. It is "without a statutory basis", as the dissent at the Court of Appeals recognized. (87a). This non-statutory requirement is especially egregious here because defendant cannot be required to do the very thing it is legally precluded from doing, *i.e.*, extend a good faith offer of work to someone defendant knows it cannot legally re-employ, as the dissenters at the Court of Appeals and Worker's Compensation Appellate Commission recognize. (91a; 71a). Defendant asks that the Court hold that § 361(1)'s exemption applies here to bar weekly benefits from June 1, 1996¹ and thereafter.

¹ This was the date plaintiff was released from prison and the date the Magistrate commenced plaintiff's award of weekly benefits.

A. The statutory provision at issue.

This case requires application of the following statutory provision, commonly referred to as the partial disability provision of the workers' compensation statute:

While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined by section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime. MCL 418.361(1).

Although it is important to appreciate that this exemption from liability is expressed in the context of the partial disability provision, it is only the last sentence of this provision specifically engaged here.

Some language in the last sentence is not relevant. For example, the reference to "section 351," which is the total disability provision, is not at issue. MCL 418.351.² Plaintiff is not totally disabled. He was working for another employer at the time of trial (32a). He earned less money there than he had earned for defendant, which potentially triggers a partial rate of compensation because he is "able to earn" post-injury but not as much as of the time of injury (45a; 31a). MCL 418.361(1). Section 361(1)'s other language exempting the employer from

² Besides § 351, § 361(1)'s last sentence also refers to § 371(1). Section 371(1) is the starting point for calculation of weekly wage loss benefits "as fairly represents the proportionate extent of the impairment of the employee's wage earning capacity." Sections 351 and 361(1) are the next step in the calculation process; one proceeds to one or the other depending on whether the impairment is total or partial.

liability while the employee is “imprison[ed]” is not at issue. Plaintiff concedes that he is not entitled to benefits during the period of time he was in prison for delivery of heroin (*e.g.*, 88a).

Elimination of the words not directly relevant so as to more sharply focus the concluding sentence of § 361(1) for this case has the provision read:

. . . an employer shall not be liable for compensation under . . . this [partial disability] subsection for such periods of time that the employee is unable to obtain or perform work because of . . . commission of a crime.

B. Plaintiff’s commission of a crime means defendant cannot re-employ plaintiff because of MCL 791.205a.

Once plaintiff was convicted and imprisoned for delivery of heroin, his employment with defendant automatically terminated (62a). Plaintiff was ineligible to be re-hired by defendant because the following statute went into effect while plaintiff was imprisoned:

(1) Beginning on the effective date of this section [March 25, 1996], an individual who has been convicted of a felony, or who is subject to any pending felony charges, shall not be employed by or appointed to a position in the department [of corrections]. MCL 791.205a(1) (bracketed words added).

The rationale for this statute was described as follows by the House Legislative

Analysis Section:

According to Department of Corrections’ (DOC) estimates, there are currently 90 individuals with records of felony convictions in its facilities. Of these, 60 are corrections officers. Although the DOC currently requires a background check and the director’s approval before an individual with a felony record can be hired, some people believe that the number of ex-felons employed by the department is too high, especially in the field of corrections officers. These persons believe that, in order to promote security in prisons, the department should be statutorily prohibited from hiring convicted felons. (7a).

Conviction for delivery of heroin is a felony. MCL 333.7401. Therefore, plaintiff could “not be employed by or appointed to a position in the department” of corrections upon his release from prison. MCL 791.205a(1).

C. Application of §361(1) as it reads.

Each ingredient for application of the exemption of liability in § 361(1) is satisfied in this case. Plaintiff is “unable to obtain or perform work” and that inability is “because of ... commission of a crime.”

First, plaintiff “is unable to obtain or perform work.” The work which plaintiff is unable to obtain or perform is work for defendant.³ Plaintiff has argued he does not meet the “unable to obtain or perform work” requirement because he is able to work as exemplified by the fact he is working for another employer. But, § 361(1)’s “unable to obtain or perform work” requirement does *not* mean that the person must be unable to obtain or perform *all* work. This conclusion is evident by the Legislature’s placement of the exemption in the partial disability provision. The partial disability provision addresses those situations where there still is a post-injury ability to work. The sentences in § 361(1) which precede the exemption contemplate an ongoing “abi[ility] to earn” post-injury at an amount less than at the time of the work injury.

Put differently, the Legislature’s placement of the exemption in the very statute which requires *partial* disability payments means that the exemption’s phrase “unable to obtain or perform work” does not mean inability to perform all work. It means unable to perform some

³ Employers are permitted to mitigate their workers’ compensation liability by, amongst other things, re-employing an employee who has restrictions from a work injury so as to mitigate the workers’ compensation loss. MCL 418.301(5)-(9) and see generally, *Bower v Whitehall Leather Co*, 412 Mich 172, 182; 312 NW2d 640 (1981). This mitigation device originated via case law - the favored work doctrine - and is now codified in §301(5)-(9). *Pulver v Dundee Cement Co*, 445 Mich 68; 515 NW2d 728 (1994).

work. The exemption is in fact most appropriate where the employee *is* able to obtain or perform work - *i.e.*, not totally unable to work because of the work injury - but unable to exercise that ability to work because of “commission of a crime.” The Legislature no doubt found the partial disability provision the appropriate place to insert the exemption because the exemption is most meaningful where the claimant is physically able to work but precluded from doing so because of a criminal record.⁴

Therefore, persons who are able to earn less post-injury than they had at the time of the injury are entitled to partial weekly compensation benefits. Plaintiff was working post-injury while incarcerated, after his release, and also at the time of trial (32a). He always earned less than he had at the time of his injury while employed with defendant (31a; 45a). He was therefore seeking partial disability benefits under § 361(1). The exemption from liability in that same partial disability provision applies because plaintiff is “unable to obtain or perform work” *for defendant*.

Second, plaintiff’s inability to obtain or perform work for defendant is “because of” his “commission of a crime”, a felony. Given MCL 791.205a, defendant cannot re-employ plaintiff because of his conviction. Notably, none of the decisions below suggest that MCL 791.205a permits defendant to re-employ plaintiff.⁵ Again, the exemption’s placement in the

⁴ *Accord, Baskerville v Saunders Oil Co, Inc*, 336 SE2d 512 (Va App 1979); see also, *Brinker’s International, Inc v Workers’ Compensation Appeal Board*, 721 A2d 406 (Pa Comm 1998).

⁵ Judge Neff on a related point “would question” whether an exception to MCL 791.205a, specifically subsection 3 [“This section does not apply to a person employed by or appointed to a position in the department before the effective date of this section.”] might apply, but Judge Neff acknowledges that the “parties seem to agree [otherwise], and the WCAC specifically found, that after his injury plaintiff was no longer employed by defendant, and thus, MCL 791.205a(3) does not come into play.” (79a). As Judge Griffin noted in this respect, “On appeal, plaintiff does not contest the unanimous WCAC conclusion regarding his employment status as of the effective date of MCL 791.205a.” (86a).

partial disability provision is telling. If plaintiff was totally disabled under § 351, plaintiff would argue that he is unable to work only “because of” complete physical incapacity. Even in that situation, the Legislature exempts the employer from liability. The Legislature surely intends the same result where the person *is* able to work but cannot due to a criminal record.

Given that defendant satisfies § 361(1)’s requirements, defendant need satisfy nothing more. The decisions below require more than what § 361(1)’s terms require. The majorities in the appellate decisions below import into § 361(1) a requirement not found there. That is an error of law.

D. Section 301(5)’s requirements are not cross-referenced in Section 361(1) and cannot legitimately be engrafted onto Section 361(1).

Judge Neff in her lead opinion and Judge White in her concurring opinion (which agreed with the Commission majority) avoided application of § 361(1)’s plain language by holding that the provision’s exemption from liability did not apply unless defendant “in fact had an open position constituting reasonable employment^[6] that plaintiff could have performed, and

⁶ “Reasonable employment” is a term of art, a reference to Section 301(5)(a) and (9) of the worker’s compensation statute. The two provisions read:

(5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal. MCL 418.301(5)(a).

* * *

(9) “Reasonable employment”, as used in this section, means work that is within the employee’s capacity to perform that poses no clear and proximate threat to that employee’s health and safety, and this is within a reasonable distance from that employee’s residence. The employee’s capacity to perform shall not be limited to jobs in work suitable to his or her qualifications and training. MCL 418.301(9).

that it would have offered such employment had the bar not been in effect.” (84a; footnote 6 is defendant’s). Or, in the words of the Commission majority, in order for the exemption from liability to apply there must be a finding by the Magistrate “that defendant would . . . have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition”. (68a).

There is nothing within § 361(1) that imposes such a condition^{*} precedent to operation of the exemption. As Judge Griffin noted in dissent, “The new evidentiary burden of proof and production created and imposed on defendant to establish that but for a statutory prohibition, defendant would have offered plaintiff reasonable employment is without a statutory basis.” (87a). Section 361(1) does *not* read: “an employer shall not be liable for compensation” where the “employee is unable to obtain or perform work because of . . . commission of a crime *if the employer demonstrates that but for the commission of a crime it would have offered the employee ‘reasonable employment’ as described in Sections 301(5) and (9).*”

There is also no cross-reference to § 301(5)’s requirements anywhere in § 361(1). The plain meaning of § 361 does not require a § 301(5) inquiry. Yet, virtually all of Judge Neff’s lead opinion is an exploration of § 301(5), despite as Judge Griffin says “defendant did not argue that plaintiff’s claim was barred due to plaintiff’s failure to accept reasonable employment.” (87a). Judge White and the Commission majority likewise dwell on a § 301(5) analysis unnecessarily since it is neither part of § 361(1) nor cross-referenced there.

E. “Catch-22”.

Judge Griffin and the Commission minority recognize the distortion which results from importation of § 301(5)’s requirement to § 361(1)’s exemption. It creates “an artificially-created burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon.” (87a). The

dissent at the Commission and Court of Appeals correctly say this creates a “catch-22” situation for defendant. (*Id.*)

The “catch-22” analogy is perfect. Mr. Yossarian in the novel *Catch-22* by Joseph Heller could not be exempted from flying combat missions unless he was deemed mentally unfit. Whenever he asked to be exempt from flying combat missions, he demonstrated his mental fitness because avoiding danger demonstrates mental fitness. Similarly here, the decisions below say defendant is not exempt unless it would make a *bona fide* offer of re-employment to plaintiff as defined by § 301(5)(a). An employer’s offer of “reasonable employment” in § 301(5)(a) must be a genuine *bona fide* offer, rather than an offer which the employer knows the employee cannot perform. *Kolenko v US Rubber Products*, 285 Mich 159, 162; 280 NW 148 (1938) [“The burden was on defendant to show that it offered plaintiff work *which she could perform ...*” (italics added).]; *Hope v Welch Grape Juice Co*, 46 Mich App 128, 132; 207 NW2d 476 (1973) [“we hold that (defendant) did not make a specific firm offer of employment *which would be within the means of the plaintiff to perform ...* because [t]he testimony discloses that arrangements with the union would have to be made” regarding bidding for jobs and seniority (italics added).]; *Jones-Jennings v Hutzler Hospital*, 223 Mich App 94, 108; 565 NW2d 680 (1997) [An offer of “reasonable employment” is invalid if it cannot be accepted by claimant because offered job is too far away.]; *Ayoub v Ford Motor Co*, 101 Mich App 740, 745; 300 NW2d 508 (1980) [“Our reading of the cases leads us to conclude that a *realistic* and definite offer must be present before the worker’s conduct is called into question” (italics added).].

An offer of illegal re-employment is not a “*bona fide*” offer. An offer that defendant knows beforehand cannot be accepted by plaintiff (and cannot legally be acted upon

by defendant) is not a “good faith” offer. Defendant is being required to offer illegal employment. The law does not require a party to perform a useless act - and in this case - an illegal one. In *Cichecki v City of Hamtramck, Police Department*, 382 Mich 428, 437; 170 NW2d 58, 61 (1969), the Court explained in a comparable setting:

It is argued that there is one further requirement that the plaintiffs must meet before they can gain the benefits of the presumption [in favor of workers’ compensation benefits]. The statute requires that the dependents attempting to gain the benefits of the presumption must first apply for and be denied the pension provided in the city charters. In this case the plaintiffs made no such demand. It is apparent, however, that the charter makes no provision for *any* pension benefit for these minor children dependents if the widow is still alive. To make such a demand would therefore be futile and our law does not require a party to perform a useless act. *Modern Globe, Inc., v. 1425 Lake Drive Corporation* (1954), 340 Mich 663, 669. *Cichecki, supra*, at pp 436-437 (bracketed words added).

Therefore, the controlling appellate opinions below not only require an extra-statutory useless gesture, they require an offer that *per se* is not a *bona fide* offer so as to satisfy § 301(5)(a).

F. This is a legal, not factual, question.

The issue here is a legal not factual issue. The decisions below are *legally* erroneous for the reasons stated. The Commission majority treated the question as factual [“Upon careful review of the record, we find the magistrate’s finding that defendant would *not* have made an offer of reasonable employment to plaintiff were it not for the statutory prohibition, as supported by competent, material, and substantial evidence on the whole record. MCL 418.861a(3).”]. (68a). It is not a factual question because legally no question is posed in § 361(1) as to whether defendant would have made an offer of reasonable employment were it not for the statutory prohibition. For the same reason, Judge White’s concurring opinion, the only one of the three opinions from the Court of Appeals adopting the Commission majority’s

reasoning, is erroneous. The question is not whether there is “a *factual* finding that the DOC bar actually prevented the DOC from offering reasonable employment” (84a, emphasis added). There is no such factual question because § 361(1) asks no such question and because, particularly under the circumstances here, there is a *legal* bar to defendant extending such re-employment.

G. Even if reference to job opportunities at defendant was a condition precedent to § 361(1)’s exemption, defendant proved such job opportunities.

The Commission majority may have been prompted to require a showing of a *bona fide* reasonable employment offer to remove all doubt that plaintiff’s unemployability for defendant was “because of” the crime, rather than “because of” the lack of opportunity for accommodated work for defendant. Laying aside the absence of any such requirement in § 361(1), the Commission is wrong because defendant did demonstrate opportunity for accommodated work for defendant (38a-43a).

This point warrants some development with an appreciation of the chronology of events. Defendant paid plaintiff workers’ compensation benefits when he stopped working. At the time, defendant had a policy that plaintiff had to be 100% fit to return to work for the department and plaintiff was admittedly not 100% fit then (or now) (49a; 17a; 27a). Two things happened chronologically while plaintiff was imprisoned, however. Defendant changed its “100% fit for duty” policy and the Legislature passed the law precluding employment of ex-felons for the reasons summarized by the House Legislative Analysis Section quoted earlier (38a; 60a, respectively). While plaintiff is still not 100% fit to work as a corrections officer, that is not what precludes defendant from returning plaintiff to work today.

Joanne Bridgeford, defendant's disability management coordinator, testified plaintiff could be re-employed for defendant presently but for the statutory prohibition. She testified:

Q. Can an individual, in the past, return to employment if they had any restrictions for the Department of Corrections? In the past, prior to your --

A. No.

Q. -- coming to the scene?

A. No, there was a requirement that they were one-hundred-percent fit for duty.

Q. Is that still the case today?

A. No.

Q. When did the policy change take place if, in fact, there was a formal policy change?

A. With the inception of ADA.

Q. And do you recall when that occurred --

A. Oh --

Q. -- as far as it applied to the State of Michigan? If you don't know, say --

A. No.

Q. Okay. You listened to Mr. Sweatt testify today; you're familiar with his file. If an individual came to you with a knee injury, could they be placed in employment with the Department of Corrections?

A. Yes.

Q. What type of jobs would [it] be possible to place an individual such as Mr. Sweatt in?

A. That depends. If a person comes to me with an injury, I have to look at what their work restrictions are, what their qualifications are, their geographic location, where we have vacancies. There's a whole bunch of different factors that go into returning them to work.

Q. Have you placed anybody back to work for the Department of Corrections?

A. Yes, I have.

Q. What type of numbers are you dealing with?

A. As far as those I've returned to work?

Q. Yes.

A. Twenty-six. (62a-63a).

* * *

A. The types of injuries?

Q. Yes.

A. Oh, everything from back strain, knee injuries, closed-head injuries, psychiatric injuries. They pretty much run the gamut.

Q. The knee injuries, where did you place them?

A. General office assistant. I did one as an ARUM working inside the institution, some as training officers, tether -- or working as word processing assistants. Kind of all over.

Q. Could you put Mr. Sweatt back to work if you wanted to with the Department of Corrections?

A. No.

Q. Why not?

A. Because, well --

MR. HARVEY: Again --

THE WITNESS: -- he's on parole.

MR HARVEY: -- let me just object as to the relevance here. It's not --

MAGISTRATE SMITH: No, this is very relevant.

MR. HARVEY: Well, I note -- go ahead.

THE WITNESS: He's on parole, and he has been convicted of a felony, and there is a State law that prohibits Department of Corrections from hiring individuals who have been convicted of felonies.

Q. (BY MR. JONES): When did that law go into effect?

A. I don't -- '96, I believe.

Q. Is there any way -- I mean, if Mr. Sweatt was being paid voluntarily right now, is there any way, to lessen your liability, you could place him, or is it a flat out ban?

A. Flat out ban.

MR. JONES: Thank you.

MAGISTRATE SMITH: Mr. Harvey.

MR. HARVEY: Thank you. (65a-66a).

Rather than requiring proof of job opportunities, the majorities below instead insisted on the exacting specificity attendant to offers of "reasonable employment" under § 301(5). *Price v City of Westland Police Department*, 451 Mich 329, 337; 547 NW2d 24 (1996). Those requirements "can be somewhat formalistic" insofar as the employer must extend, usually

in writing, a definitive offer of a job to the claimant to the exclusion of others and all must be done in good faith. *Ayoub, supra* at 745. Again, such exacting requirements for a good faith offer are impossible here where defendant knows plaintiff cannot legally be re-employed.

Compare, *Hope* and *Jones-Jennings*, both *supra*.

Therefore, even if proof of job opportunities was a statutory condition precedent to § 361(1)'s exemption, it was met here. Opportunity to work exists. What cannot be accomplished is a formal good faith offer of such work to one who cannot legally be re-employed.⁷

H. Inconsistencies in the decisions below.

The majorities below have also fashioned an inconsistent reading of the § 361(1)'s exemption. No *bona fide* offer of reasonable employment was required as a condition precedent to exemption while plaintiff was imprisoned. That is, defendant was not required to extend a "*bona fide*" job offer of work to plaintiff while he was in prison in order to enjoy § 361(1)'s exemption. Yet, the decisions below create this condition precedent for periods of time after plaintiff's release from prison.

The statute makes no such distinction. An imprisoned person obviously cannot work for his or her prior employer and the employer knows that beforehand.⁸ An offer of employment to someone so situated is not a "*bona fide*" offer. Yet, the decisions below compel

⁷ The United States Supreme Court in *Hoffman Plastic Compounds, Inc v National Labor Relations Board*, 535 US ____; 122 S. Ct. Rep. 1275; 152 L. Ed. 2d 271 (2002), addressed a somewhat analogous situation: should an undocumented alien, never legally authorized to work in the United States, be awarded back pay under the National Labor Relations Act if the employer illegally responds to the alien's union organizing activities? The Supreme Court held that back pay was an improper remedy because the employment was illegal and mitigation of damages was impossible because it would require illegal employment. Slip op at 12. So too here, defendant cannot mitigate damages by illegally employing plaintiff.

⁸ Compare, *Mize v Cleveland Express*, 329 SE2d 275 (Ga App 1990).

defendant to meet such requirement after plaintiff's release from prison. The statute does not differentiate between the exemption's application while imprisonment and afterwards, but the decisions below do.

Comparing application of the exemption while plaintiff was in prison and afterwards is also important for another reason. Recall plaintiff has argued that the "unable to obtain or perform work" ingredient in § 361(1) means plaintiff must be completely unable to work for the exemption to apply. Yet, plaintiff does not contest that he is ineligible for benefits while imprisoned, even though he worked while in prison (21a). Therefore, that part of the exemption which says the person must be "unable to obtain or perform work" cannot mean that the person is unable to obtain or perform work everywhere. If that were the case, then plaintiff would be seeking (and the decisions below would be awarding) benefits for the period of time plaintiff was in prison.

I. The ramifications of this decision flow beyond § 361(1).

There are other statutes that preclude the hiring of persons who commit crimes besides the ex-felon statute which precludes plaintiff's employment with the Department of Corrections here. For example, MCL 28.601, *et seq*, promulgate minimum employment standards for Michigan law enforcement officers. These standards also exclude persons with prior felony convictions. Similarly, an attorney "is automatically suspended" upon conviction of a felony. MCR 9.120(B)(1). And, a "judgment of guilt in a criminal prosecution ... may be used as evidence in the determination [of a person's good moral character], subject to rebuttal," by a licensing board or agency for occupational or professional licenses in general. MCL 338.42.

There are also practical hiring concerns unrelated to specific statutes that prohibit hiring persons who have committed certain crimes. A person who was convicted of

embezzlement, for example, is not a likely candidate to work as a bank teller. Such a person is thus “unable to obtain or perform” such work because of “commission of a crime.” Likewise, persons convicted of assault or sexual felonies would not be viable candidates for jobs as childcare workers.

Finally on this point, suppose a person who works as a driver is convicted of driving while intoxicated. The violation leads to 30 days in jail and a suspended license thereafter for 2 years. Even after imprisonment, such person is unable to work again at his or her driving job for 2 years “because of commission of a crime.”

In a word, the ramifications of the decisions below go beyond MCL 791.205a’s preclusion from hiring ex-felons at the Department of Corrections.

Equally important is the point made by Judge Griffin (and contested by Judge Neff) which strikes at the heart of the workers’ compensation system itself. A cardinal precept underlying workers’ compensation from its inception, a precept that emerges in different statutory provisions and venerable case law, is the principle: there must be a direct relationship between a disabling work injury and subsequent unemployment in order for there to be workers’ compensation liability in the employer. See *Lauder v Paul M. Wiener Foundry*, 343 Mich 159; 72 NW2d 159 (1955); *Simpson v Lee & Cady*, 294 Mich 460; 293 NW 718 (1940).

This elemental principle manifests itself in various provisions of the Worker’s Disability Compensation Act. A person who suffers a disabling work injury and becomes unemployed is not entitled to benefits if the work injury was “by reason of his intentional and willful misconduct”. MCL 418.305. The thread between the disabling work injury and the employer’s liability is severed by the employee’s intentional, willful misconduct. Likewise, an employee who sustains an injury at the workplace that disables him or her is, nevertheless, not

entitled to benefits where the “injury [was] incurred in the pursuit of an activity the *major* purpose of which is social or recreational”. MCL 418.301(3) (italics added). Such injury, partly work-related but mostly social, exempts the employer from liability because the work connection is insufficient, per the Legislature, to sustain liability. An employee who unjustifiably refuses to rehabilitate himself from a work injury so as to mitigate the employer’s loss is subject to “a loss or reduction of compensation in an amount determined by the director for each week of the period of refusal,” except in very specific circumstances. MCL 418.319(1). And, the most frequently discussed (as we can see from this case) example of employer exemption is an employee who sustains a disabling work injury yet is unemployed thereafter because she refuses a *bona fide* offer to work within her restrictions. MCL 418.301(5)(a).

With respect to case law, in *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628; 566 NW2d 896 (1997), the Court emphasized in construing the definition of disability that a person who has a disabling work injury (a work injury that precludes the performance of one or more jobs within the employee’s qualifications and training) is *not* entitled to workers’ compensation benefits where the employer demonstrates there is not “a *direct* link between wages lost and a work-related injury.” *Haske, supra*, at 661 (italics added). Examples given by this Court in *Haske* and in *Sobotka v Chrysler Corp*, 447 Mich 1; 523 NW2d 454 (1994) are such things as: a unilateral decision to avoid available, accommodated work; a refusal of a specific, *bona fide* offer of reasonable employment under MCL 418.301(5); or, unemployment due to a non-work-related illness rather than the disabling work injury. *Haske, supra*, at 662 n 38; *Sobotka, supra*, at 26. The rationale is clear: these reasons sever any link between work injury and diminution of wages.

Case law also provides that employees who unreasonably refuse medical treatment that presents a reasonable chance of success and poses no real danger so as to mitigate the employer's damages is not entitled to further benefits. *Dyer v General Motors Corp*, 318 Mich 216; 27 NW2d 533 (1947). The same holds true for the employee who refuses exercises designed to strengthen and hasten recovery, thereby mitigating the effects of the injury. *Brown v Premiere Mfg Co*, 77 Mich App 573; 259 NW2d 143 (1977).

All of these threads in the statute and case law derive from a central source, the principle that there must be a direct link between the disabling work injury and the subsequent wage loss. Workers' compensation was not designed to compensate employees whose wage loss is attributable to a non-work-related reason rather than the work injury. MCL 418.301(1) and (4); *Lauder*; *Simpson*, both *supra*. Worker's compensation was designed to spread the cost of individual injuries on the general public and taxpayers by increasing the cost of goods and services. *Larson*, *Larson's Workers' Compensation Law*, Vol 1, §1.00, p 1-1 to 1-3 (2002). That added cost is a cost which is to reflect the effect of lost time *due to work injuries* on the employer. *Id*. It was not designed to bear the cost of lost time from work due to, as here, commission of a felony. Judge Griffin recognized this. Tracing the history of the bill which became § 361(1), as proposed by Representatives Engler and Ciaramitaro, he recognized that: "Such events break the causal connection between the employee's original injury and the employer's liability." (91a).⁹

⁹ Justice Neff disagreed saying, "I find no authority supporting this view, and the dissent cites none." (83a). Judge Neff cites *Russell v Whirlpool Financial Corp*, 461 Mich 579; 608 NW2d 52 (2000) as an example of benefits not being denied in a wrongful discharge case. However, that particular result is controlled by specific statutory language pertinent to working less than 100 weeks at reasonable employment. MCL 418.301(5)(e). In any event, what Judge Griffin did not cite in support of his view, defendant cites here.

It is therefore important that the Court maintain the fundamental idea that there be a direct link between work injury and a loss in wages. Obstacles such as requiring offers of “reasonable employment” in the face of statutes that contain no such requirement offend not only the statutory provision at issue, but the system’s basis as well.

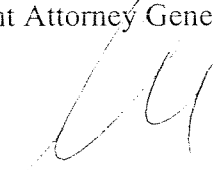
RELIEF SOUGHT

WHEREFORE, defendant-appellant, Department of Corrections, respectfully requests that the Supreme Court reverse the Court of Appeals and hold that plaintiff is not entitled to weekly benefits pursuant to MCL 418.361(1).

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